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# Whither Jurisprudence?

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**Whither Jurisprudence?** By Anthony D'Amato\*,  
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**Abstract:** After considering the side road of critical legal studies, I shall try to indicate the major signposts to a more complete jurisprudence. These signposts take the form of questions or anomalies in our present understanding of law. I will conclude that only by following these signposts, by exploring these questions and anomalies, will we begin to uncover the nature of law and justice.

**Tags:** Jurisprudence, Critical Legal Studies (CLS), Doctrinalism, Legal Realism

[pg971]\*\* Jurisprudence is the rigorous study of the nature of law. That is how I would like to define the term. I am not importing anything mystical or naturalistic into the definition by using the term "nature"; rather, I use it in the same sense that a pure mathematician is said to be investigating the nature of arithmetic by attempting to prove or disprove the theorem that the number of paired primes continues indefinitely. In fact, I would like to draw particular attention to the analogy of law to mathematics: both are artificial constructs of the human mind, neither exists in nature, and yet both are sufficiently complex that we are still exploring and discovering new facts about them.

Investigating the nature of law is not the same as deciding what the laws should be. A legislator writes on a fairly clean slate; the motives and political considerations that fuel the legislative machine and result in an output called statutes are unbounded by any *a priori* theory. To the extent that followers of Critical Legal Studies ("CLS") urge us to reshape existing law in accordance with their economic or political desires, I find their prescriptions to be of legislative, not jurisprudential interest.FN1

But CLS purports to offer us, in addition to its political vision, a jurisprudence. Its insights are important for at least the reason that it takes the rhetoric of law seriously. Yet I feel that CLS, for reasons I shall try to indicate, is not the main road for jurisprudence in the years ahead, although it is an important side road. After considering this side road, I shall try to indicate the major signposts to a more complete jurisprudence. These signposts take the form of questions or anomalies in our present understanding of law. I will conclude that [pg972] only by following these signposts, by exploring these questions and anomalies, will we begin to uncover the nature of law and justice.

*A. Doctrinalism*

Roberto Unger has accused traditional legal philosophers of objectivism and formalism. FN2 I would like to accept his charge and in turn accuse him of doctrinalism. To explain my response to Professor Unger, please indulge me in a bit of personal intellectual history.

When I started teaching law, I was full of self-confidence. Soon, though, I realized that the students considered me an aberration from the prevailing instructional mode. Most of my colleagues, with a few exceptions, apparently thought of law quite differently than I conceived of it. When students came to my class, they assumed, understandably, that as a young professor I simply didn't know what I was doing.

After long discussions with students, and after visiting some of my colleagues' classes, I discovered the prevailing pattern of legal instruction. My colleagues would start with a case; they would lead the class in discussing the issues in the case; and then, finally, extract a rule from the case. This rule would be deemed the decisional rule of law, which the students invariably wrote in their notebooks even if they hadn't taken any other notes. Then the professor would go on to the next case, and follow the same pattern. The second case would yield a rule that, when added to the rule in the first case, began flesh out the particular area of law. Aha! I concluded, a case is an *illustrated rule*.

I saw how convenient it was for law-school teachers and students to regard a case as an illustrated rule. It makes the rule *fun* and *easy* to learn, because everyone enjoys and remembers the story of the case. And for the harried student (who in her second or third year, might be holding down a part-time job in a law firm) it makes class quite dispensable. She can get her rules *straight* without going to class simply by reading one of the ubiquitous outlines or nutshells. Poring over Gilbert's outline, to be sure, isn't as much fun, because it isn't *illustrated*, but it's surely more time-efficient.

When students came to my class expecting to study cases as illustrated rules, they were of course upset by my approach because I challenged the rule-regime presented in their other classes. I used cases to throw into great doubt *any* rule, save perhaps a rule as complex as the [pg973] case itself. In short, for me then and now<sup>FN3</sup> a case does not illustrate a rule, whereas a rule *might* illustrate a case if the rule were stated in enough detail as almost to recapture the facts of the case in the statement.

I am an anti-reductionist. I believe that any attempt to state the rule of a case invariably distorts the case, and that the shorter the statement of the rule the more distortion creeps in. I hold to this position because I believe it is an accurate description of what judges do. By and large, judges decide cases and not rules; judges hear fact situations and assign outcomes to them. Along with the Legal Realists, then, I think that rules are rationalizations of the results judges reach. But unlike the Legal Realists, I am not *disappointed* that rules don't decide cases because I believe that a rule is an imperfect mechanism to capture the variance of the facts and therefore is largely incapable of deciding cases.

In contrast to the widely accepted case method and my own antirule approach, a doctrinalist is one who says that a number of cases illustrates a number of rules. The methodology of teaching law as doctrine was practiced long before the advent of the case method and now seems to be coming back into favor. CLS teaches doctrine with a vengeance; it is extremely reductionist.

CLS was materially helped along its reductionist path by Ronald Dworkin. The paucity of citation to Dworkin in the work of CLS theorists is, I'm afraid, in inverse proportion to the influence Dworkin has had on the CLS movement. After all, Dworkin taught us that principles, as well as rules, can be found in cases;<sup>FN4</sup> more than that, whole political *theories* can be found in the legal materials.<sup>FN5</sup> In this respect, Dworkin's doctrinalism paved the way for CLS. Yet CLS has perhaps slighted Dworkin for political reasons—the conservatism of his doctrine. The principles, rules, and policies that Dworkin extracts from legal materials reflect existing

institutional arrangements—rather naturally, since law in general reflects existing institutions. In contrast, the CLS writers are radical and visionary; for them legal doctrine encompasses social realities other than presently existing social relations. CLS' view does not equate law with the status quo. Inevitably, then, a normative element enters into the CLS account of [pg974] doctrine.FN6 If, for followers of Dworkin, cases merely illustrate doctrine, for CLS, certain cases illustrate the *right* doctrine, and others, which reflect incorrect or incoherent doctrine, should be overruled.FN7

Another fundamental similarity between some CLS members and Dworkin is the way in which they treat legislation and adjudication as interchangeable. When Dworkin argues that legal materials are the source of rules, principles, policies, or theories, he includes both statutes and cases within the definition of legal materials. CLS similarly elides the distinction between cases and statutes; indeed, Professor Unger says that the formalist theory (which he rejects) "can be restated as the belief that lawmaking and law application differ fundamentally."FN8 Both Dworkin and CLS—though Dworkin rather uneasily—see cases and statutes as jurisprudential equivalents because they believe that judges really legislate (even though the judicial mandate is confined to interstitial legislation).

The intellectual source for both CLS and Dworkin is positivism, which theorizes that a statute contains a double communication to the judge: apply the statute to cases that fall within its core meaning, and legislate in the penumbra.FN9 If this is indeed what judges do, then theories predicated on judicial discretion and appeals made to a normative vision of society will prove the most effective means of influencing judges' decisions. CLS adherents will presumably be effective in addressing judges whom they think are empowered to depart from existing law by espousing normative doctrine.

I plead guilty to formalism; I naively believe that lawmaking and law application differ fundamentally. And, as I've previously said, I am not a doctrinalist; I don't believe that cases are mere illustrations [pg975] of rules. Let me now try to expand upon and defend my position on these two matters, beginning with my position that doctrinalism is an unwarranted form of reductionism.

### *B. The Reductionist Fallacy*

The law consists of thousands and thousands of cases, each a microcosmic drama for the participants, each involving opposing attorneys utilizing their intelligence to convince an intelligent judge. The judge attempts to mediate the parties' dispute with an eye toward avoiding other potential disputes through a good decision in the present case. A decisional pattern emerges informed by extensive legal brainpower, sharpened in adversarial confrontation, refined by considerable expense of time and money.

These cases stand for the resolution of innumerable disputes that arise in society. These disputes have been mediated; interpersonal relations have been settled without resort to physical violence. The cases are a great repository of learning, a corpus that has grown by accretion just like the strata in sedimentary rock composed of millions of years of minute evolutionary changes.

Doctrinalists try to summarize this vast repository of learning with a simple verbal formulation or two. Duncan Kennedy, in an early article, summarized millions of cases in all areas of law within two propositions: altruism and self-interest.FN10 In a more restricted area of law, summarizing perhaps only hundreds of thousands of cases, Professor Unger found two governing rules: freedom to contract and community.FN11 At the risk being somewhat unkind, these approaches strike me as akin to explaining to an evolutionary biologist, who is studying atavism in polydactyl horses, that the whole subject becomes quite comprehensible when one realizes that throughout biology there are two overarching principles: the animal and the vegetable.

Perhaps what is wrong with the principles of Professors Kennedy and Unger is that they are posed as paired opposites. Perhaps what is needed is reductionism that is not quite so severe. A more recent article by Professor Kennedy thus is offered.FN12 There, Professor Kennedy finds three principles in tort and contract law (although we are not clearly told whether these are to be added to his previous principles [pg976] of altruism and self-interest or whether they supersede them). The three principles are: efficiency, redistribution, and paternalism. Because Professor Kennedy, like other CLS theorists, views judges as mini-legislators, he calls these principles "motives." Whether or not they are "motives," I take Professor Kennedy's thesis at its strongest, namely, that these three somethings greatly illuminate the results reached in hundreds of thousands of cases.

But now, having moved from paired opposites to three unrelated principles, we have moved from an exhaustive list to one that may have gaps. At least altruism and self-interest exhaust the universe; but there may be other motives besides efficiency, redistribution, and paternalism. What are they? How do the three motives relate to each other? How do we know admixtures of two or more of them when we see them? What percentages show up in such admixtures? If I say that a judge decided a certain case one-tenth for efficiency motives, four-tenths for redistribution, and half for paternalism, have I "explained" the case or indulged in a whimsy?

A good cautionary tale against this type of reductionism can be found in a consideration of the development of theories of motivational psychologists during the early part of this century. Some psychologists of motivation believed that human behavior could be predicted and understood on the basis of simply expressed animating motives. For example, at first it was thought that *love* and *hate* in various combinations might account for all human actions. But, then, although love and hate exhausted the universe, it seemed that some actions were inadequately explained by either or both of them, but well illuminated by *greed* or *envy*. So the psychologists expanded the list. But why stop at four? A person's behavior might only be dimly understood by reference to any or all of these four traits, but be far better understood by the term *ambition*. So they added *ambition* to the list. In 1938, in the apotheosis of this movement, H.A. Murray, a professor of psychology at Harvard, set forth a list of about 100 basic motivations.FN13 After the applause settled down, it was realized that the more we had, the less we knew. And since it had earlier been realized that the less we had the less we knew (for that is why new items were continually added to the list), the general consensus formed that the whole enterprise was suspect.

There is, however, a more radical argument against reductionism. To return to Kennedy's discussion of contract and tort law, how do we know when paternalism, for instance, is manifested? Suppose a [pg977] defendant in a contract action pleads as an excuse that he made a mistake based on ignorance of the market. Is it paternalistic to decide *for* the defendant (assuming he was sincerely ignorant)? Or is it paternalistic to decide *against* the defendant, thus teaching him a "lesson" that will serve him in good stead along the rocky of commercial life?

The difficulty in maintaining a legal distinction between two qualities such as individualism and altruism, or contract and community, is reminiscent of a central problem in modern physics. At the turn of the century there were two competing theories to describe photons of light: particle theory and wave theory. The wave theory was supported by optical experiments where interference fringes were observed. The particle theory was supported by black-body radiation experiments and the photoelectric effect. So, what were photons--waves or particles?

The great quantum mechanical discoveries of the late 1920's demonstrated that photons were *both* particle and wave and *neither* particle nor wave. Later, this discovery was found to apply not just to photons; it applied to every elementary entity making up the universe: positrons, protons, neutrons, pi-mesons, hadrons, quarks, etc. Since in the macroscopic world of our daily perceptions we cannot conceive of any such entity—both and neither particle/wave—we reluctantly conclude that the elementary entities that make up our universe are indescribable and unimaginable. In short, no verbal or visualizable theory can describe the basic building-blocks of our universe. (Some people loosely say that these elementary entities *can* be described *mathematically*, but in fact the mathematics only correlates with their behavior and doesn't "describe" it. We can predict—in the aggregate—how quantum entities behave, but we do not "understand" their behavior, since we have no analogues in our experience to that behavior.)

Based on this analogy to physics, I propose the possibility that some legal decisions simply cannot be described by any rule—whether by resort to 2 or 100 motives. An example might be Professor Unger's principle of freedom of contract and his counterprinciple of communitarianism. In the vast majority of contract cases the two might be co-present, as wave and particle are in quantum mechanics. But since, according to Professor Unger, they contradict each other, we cannot intelligibly comprehend what it means to say that they are co-present. We're left with an amazing result. In physics we know that the behavior of elementary entities is completely described by an unknowable congruence of wave and particle, and that no other [pg978] theory is necessary. Similarly, Professor Unger's principle and counterprinciple may completely describe a large number of contract cases in the sense that no other theories are necessary, but still leave totally inexplicable any given case on the basis of any combination of those theories.

There may already exist large numbers of cases for which we have been unable to fashion any rules or doctrine. Indeed, one such area turns up in Professor Unger's examination of doctrine in contracts. In discussing the application of the theory of economic duress to voidable and nonvoidable contracts, he finds that a "revised duress" doctrine with a roving

commission to void contracts between parties of disparate bargaining power could run rampant and destroy the validity of decentralized decisionmaking through contract. Then he writes:

The cost of preventing the revised duress doctrine from running wild and from correcting almost everything is to draw unstable, unjustified, and unjustifiable lines between the contracts that are voidable and those that are not. In the event, the law draws these lines by a strategy of studied indefiniteness, though it might just as well have done so—as it so often does elsewhere—through precise but makeshift distinctions.FN14

What we have in this passage is the critique of a doctrinalist who is unable to discern his own doctrine (remember, *he* formulated the principles and counterprinciples) in the cases he is examining. Apparently the alternative does not occur to Professor Unger: there may be no doctrine, including his own, that describes these cases. Instead, he draws the conclusion that *if* the cases are correctly decided, then it is the market economy which gave rise to those cases that is in need of correction. In short, the inability to find doctrinal clarity in a group of cases means that the institution that the cases reflect (here, the market economy) must be overturned and replaced by something better (i.e., something that will yield doctrinally pure decisional results).

The suspicion that the use of paired opposites may lead to a doctrine that is vacuous has not escaped the CLS theorists. Professor Kennedy has acknowledged that the paired opposites of individualism and altruism point to a kind of fundamental human ambivalence: that humans have a contradictory nature and possess both qualities simultaneously.FN15 Perhaps it could be useful to him to consult the theory of [pg979] complementarity, developed by Niels Bohr and the "Copenhagen School" to describe the indeterminacy of the wave-particle theory of quantum electrodynamics. Under complementarity, when theories come to us in mutually exhaustive opposites, each forms the boundary of the other. In this light I've suggested elsewhere that pure altruism in society is impossible—that altruism is ultimately bounded by self interest.FN16 But I am unsure that there is much explanatory power in the theory of complementarity because of its lack of specificity, and I am even less able to find anything concrete in Professor Kennedy's notion of fundamental human ambivalence. It may "explain" what "people" are in large terms, but it can hardly explain any individual case. Another way of putting this is to imagine a judge who is rigorously bound to apply Professor Kennedy's paired opposites of altruism and individualism. Despite this guaranteed supremacy of Professor Kennedy's preferred doctrine, the judge nevertheless could consistently decide the case either way.

So far I have presented two attacks on doctrinal reductionism. First, implicit in the charge of reductionism is the standard philosophical objection that descriptive power is lost as one proceeds to more generalized levels of verbal summation. Second, reduction may not even be possible in some cases. (I might go further and say that, in a real sense, reductionism is impossible in all cases, but I save that for a later day.)

Yet I do not want to rule out the possibility that rules or principles can elucidate decisional results. Maybe sometimes they do. Even though I have criticized Professors Unger

and Kennedy, I confess to anticipating with eagerness their next writings. I await their discovery of new and as yet unimagined principles that will truly reveal vast areas of legal decisionmaking. Doctrine of that power would be as satisfying to me as a "rule of law" is to the beginning law student who has come to law school to memorize lots of laws.

Nevertheless, a reader may ask, what is my alternative to doctrinalism? This is the question I find so hard to deal with when asked by law students, who put it a different way: "If the case doesn't stand for a rule, how can we understand the case?"

I submit that we don't need doctrine to understand the law. A [pg980] case doesn't live by rules alone. Rather, we can intelligibly understand the cases themselves without rules; in a peculiar sense, the medium is the message. B swings an axe at A; A, instead of fighting back, goes to court and sues B for injury and harm. The court gives a judgment to A. I propose that we don't need to have the rule-word "assault" to understand this case. Suppose we have never heard of the word "assault"—or, more realistically perhaps, suppose a beginning law student always wondered what it was but never knew. To that student, the term "assault" is *defined* by the axe case; hence it can hardly *explain* the case. We don't even need the word "assault" to communicate. In the next case, we simply refer to the previous "axe" case, or to the case of A v. B, or however we want to designate the first case. We have a picture in our minds of the axe case. We know what the judicial result was. That image communicates something to us. It is a message that we are capable of processing and storing in our minds. We simply move on to considering whether the next case ought to be judged consistently with the first one, and thus we are engaged in using and applying the law.

But knowing the *rule* can botch up our judgment on the second case. Suppose, for example, the second case involves D hitting C. If some doctrinalist has labeled this second case as one of "battery," a beginning law student might well conclude that the result in the first case has nothing to do with the result in the second case, because "assault" is clearly not the same as "battery." Yet if we leave out the rule-words, I suspect that most people, just looking at the facts, would conclude that a decision for A in the first case compels a decision for C in the second case. Why? Well, it has something to do with our knowledge of the physical world, of human nature, of logic and consistency, of the relations between people, of the need for courts to prevent violence—all things which are implicit in the "axe" case and which we readily analogize to the C v. D case.

I suspect, as well, that the economic-duress cases cited by Professor Unger, a close enough examination of the facts would provide some patterned decisional regularities. Surely if you, as a practitioner, handle a contracts-duress case, you will first read the cases in the area and try to show the court that your client should win based on the results of the most analogous leading cases. Your argument will be largely one of comparing the *facts* of your case to those cases—especially so if Professor Unger is right that the cases resist doctrinal line-drawing. But surely, argument from facts is not a failure of communication. If the cases don't lend themselves to doctrine, so much the worse for doctrine.

[pg981] I have elsewhere proposed a system of adjudication that omits all doctrine, rules, principles, and policies.FN17 It is a computer program made up of facts and decisional



results in a given jurisdiction, capable of deciding every new case that arises. Whether or not it will ever be tried or adopted, I am confident that it greatly reduces if not eliminates uncertainty in the law, leads to results that are completely predictable, yields exact egalitarian justice, and saves a tremendous amount of litigation expense (including the need for judges). But just on a heuristic basis, the program suggests that legal decisionmaking is possible absent all the rules that laymen think of as "the law."

Nevertheless I would not propose that we omit rules from our study of law. If in class I can attack the proposition that a case is an illustrated rule, and at least show that cases and rules have a symbiotic relationship, I will be satisfied. Indeed, "facts" do not come to us in unadulterated form, because we see the world through our theories of it. A judge, in listening to the "facts" of a case, will view the facts through the spectacles of the law—law that includes rules as well as facts of prior cases. Thus, the facts recounted in a judicial opinion may be shaped in part by the legal theories (doctrine, rules, principles, policies) in the judge's mind. Maybe rules and facts stand in the same relation to each other as waves and particles. Or maybe they continually refine and correct each other. Maybe they are complementary to each other. In any event, we have a great deal yet to learn about these matters. The CLS writings stimulate us in this learning endeavor, but as I have tried to show, they do not aim directly at a solution.

### *C. The Formalist Distinction*

I think legislation and adjudication are fundamentally different for reasons that are so obvious that I marvel at CLS' success in casting doubt upon them. A legislator writes on a clean slate. Under positivism, it is true, a judge also writes on a clean slate, although the slate is very tiny. But I think positivism is incorrect, and that judges do not write on tiny slates because they are called upon to tell the parties what the law was at the time the transaction took place. The parties acted under a legal regime and now, in court, they dispute what that legal regime was. They expect the judge, as law finder, to tell them. They would yell and scream if the judge wrote new law and then applied it retroactively to them.

I have elsewhere spelled out various reasons in support of the proposition that judges find, and do not make, law,<sup>FN18</sup> and there is no [pg982] point here in repeating those arguments. What I can add here is that those arguments are compatible with Legal Realism (and with CLS to the extent it is grounded in Legal Realism). A Legal Realist says that all kinds of things influence judges: the state of their digestion, their political affiliation, their economic class, whether they have been bribed by one of the parties, what policies they like, and so forth. But to this list it is permissible for me to add another motive: to do justice to the parties according to law. This certainly is a possible motive, and while it may not be as powerful as some other motive (e.g., the bribe<sup>FN19</sup>), it is one that is open to influence by rational adversarial argument. We can never know what ultimately influences a judge to make a given decision, but three years of law school education are probably worth the time and expense if judges are *somewhat* open to persuasion based on legal argument. In short, if you concede to me that there is one possible motive among others—doing justice according to the law—then a huge hole is opened in Realist theory, and through that hole we can drive a truck bearing the labels given by Professor Unger of "formalism" and "objectivism."

These days, law is, to be sure, largely found in statutes. The question of what is rational legislation, and related questions of the hierarchy of statutes and their desuetude, are properly the domain of jurisprudence broadly conceived. But since statutes use courts as their conduit for application to real people and real transactions, I think that the major advances in the study of the nature of law will come in the realm of adjudication. Perhaps to the extent I feel this way I am not as attuned as I should be to advances made by CLS which result from their mixing legislation and adjudication. I see jurisprudence from a different slant, and it may be a distorted one if I fail to do justice to the legislative component of law.

#### *D. Signposts*

We live in an exciting time of jurisprudential upheaval, paradigm shifts, wholesale reconceptualizations. The philosophic distance travelled since I was a law student in the late 1950's may best be indicated by the fact that, among editors of the Harvard Law Review at that time, it was almost universally considered a publication blunder to have published the Hart-Fuller debate in a now classic issue of that Review. I recall editors buttressing their views with letters from practitioners who threatened to terminate their subscriptions if the Review [pg983] continued to waste its pages on jurisprudential nonsense instead of on articles designed to aid practitioner research on hot subjects of large law firm litigation.

Fortunately, we have not only become more aware of the need to investigate the law itself (as opposed to this or that subject within the law), but even practitioners are beginning to feel the force of jurisprudential argument as a powerful weapon of persuasion in the courtroom. Scholarly interest in metalaw has combined with financial interest in the real world of litigation to produce a powerful and maybe sustaining interest in legal philosophy.

When the investigative intellect thus turns to the nature of a subject matter at a time of wholesale reconceptualization, a critical area of inquiry concerns the attempt to explain anomalies. An anomaly does not quite fit received theory, and tends to be brushed off as a mere curiosity or a measurement error. For example, physicists at the turn of the twentieth century were aware of an unexplained discrepancy in the measurement of the perihelion of the planet Mercury. This deviation in motion from the ellipse called for in Newton's gravitation theory was not a burning issue for physicists; they simply lived with it and turned their attention to other things. But in 1916, Einstein announced a new theory—general relativity—one of whose consequences was to predict the observed deviation of Mercury's orbit. General relativity called for the reconceptualization of gravity and accelerated motion, a theory so revolutionary that most physicists would have ignored it except for its ability to explain a few anomalies. What was an anomaly under Newton's theory became a success under Einstein's new view of the matter.

Following are some anomalies in the law which I believe will act as signposts toward a new understanding of its nature:

1. How do we deal with prospective overruling? Is it fair to both sides of a litigation? The concept seems to split the difference between whether judges make or find law, and thus points to a basic problem in our understanding of adjudication. George Fletcher has recently

called this problem an anomaly,<sup>FN20</sup> but his interesting observations about it fall short, in my opinion, of resolving the question, partly because the anomaly resounds so deeply in our fundamental understanding of law and justice.

2. Perhaps the entire question of whether judges make or find law is itself anomalous, pointing to a quantum-type resolution (judges both make and find law at the same time). We know that parties [pg984] expect judges to find the law, but what happens when judges fail to find old law in sufficient detail to decide the case? Does the pressure to find law put a significant restraint on the way the judge can make law? In the classroom, we answer this question in just about every case we study. But we are not systematic about our answers, which do not necessarily carry over into the next class on a different subject matter. More investigative rigor is needed to throw light on the nature of adjudication opened by these questions.

3. How do we explain the anomalies in professional ethics that arise when a lawyer is obliged to act against the interest of the client? Consider the problem of confidentiality when an attorney obtains knowledge that her client is about to inflict grave bodily harm illegally upon an innocent third person.<sup>FN21</sup> What is it about the nature of law that calls for attorneys to represent clients and at the same time be officers of the court? Is it a variant on the find-make law anomaly?

4. How is reasoning by analogy bounded? We reason by analogy all the time, but how do we know when one set of facts is not analogous to another? Surely any case has some similarities as well as some differences with respect to any other case. Is an assault case similar to or different from a battery case? Is a contract case a form of tort case? Again, we explore these matters all the time in the classroom, but not systematically.

5. Is it tautological to distinguish one case from another because the rule that governs it is different? How do we know whether the rules are different, or whether they are contradictory versions of the same rule (in which event the two case results are in conflict)?

6. How does the common law get started? Lord Mansfield extracted from mercantile customs a "law merchant," a new set of legal rules based on customary practice. But when, and how, does customary practice become legally binding? Positivism has never explained it, except by the nontheory called judicial discretion. Yet it happens, and continues to happen. It is an anomaly in positivist theory, and although it is quite compatible with natural-law theory, the latter so far has not explained the when and the how.

7. How do justice and morality get into the law? Are they simply accidental parallelisms? We know this much: an attorney who argues to a judge that her case is morally right but legally wrong almost invariably loses. Professionalism in advocacy comes in when the attorney can show that the morally correct result is confirmed by the law if the law is looked at in a certain way. *If* the attorney can make [pg985] this demonstration, she is more likely to win because she has both morality and law on her side. Hence, morality and justice are not irrelevant to adjudication. But the way that they are, come to be, or ought to be relevant is still a vast unexplored question. "Answers" may be found in litigation, or in students writing articles,

or in the classroom, but so far there has been no satisfying attempt to pull these answers together into a coherent theory.

8. How are law and justice related? Do we get justice when we act according to the law? Or is justice something *apart* from the law by which we can measure the amount of justice in the law? Both the CLS and economic analysis of law take the latter view. Yet wouldn't they concede that it would be *unjust* to treat two individuals differently under any given law? If so, don't we need law to have justice?

9. Does law contain the seeds of its own destruction, in the sense that legal rules unravel over time and become increasingly amorphous and incapable of resolving issues? Partly to be provocative, I advanced such a thesis in a recent article, which so far has provoked no response.<sup>FN22</sup> If I am right (and at the least I can attribute to the lack of response the chance that I am not clearly wrong), the anomalous possibility opens up that legal rules wear out and need refurbishing from time to time.

10. To my mind, the greatest anomaly of all in the study of law is the possibility that Hume was wrong when he insisted on a dichotomy between *is* and *ought*. The law that is may turn out to be a sort of quantum fusion between the law that is and the law that ought to be. It is possible that our Western, scientific, denotative language is itself responsible for separating the *is* from the *ought*, and that we are prisoners of a mistaken theory as a result of the very words which we use. If existing law is in fact—apart from our linguistic analysis of it—a fusion of the *is* and the *ought*, perhaps that possibility will go a long way toward resolving the previous anomalies I mentioned, including the one that judges both make and find law. The make-find problem, indeed, may be a variant of the is-ought problem. The question of how justice is related to law—which on its face ought to be *the* question of legal education—may also be a variant on the is-ought problem.

All the preceding anomalies come up in the classroom and in legal practice. They are resolved on a piecemeal basis. Often they are ignored. Often there is a mental block against them because of their inherent difficulty. More usually, they are papered over with [pg986] ambiguous words that purport to resolve them. If Professor Unger's "objectivism" and "formalism" refer to a possible theory that may someday explain those anomalies, I would argue that instead of having too much objectivism and formalism, we do not have enough. But I think we are heading there, and Professor Unger's attack on this approach may have the dialectical effect of stimulating it.

## Footnotes

\*© Copyright 1986 Anthony D'Amato, Professor of Law, Northwestern University. The author would like to thank Professor Arthur Jacobson for inviting him to write this Article and for a critique of its first draft that was so pointed that a full 70% of that draft was changed for this final version. This Article also benefitted from a reading of Professor Jacobson's contribution to the present Symposium, 6 Cardozo L. Rev. 713 (1985) particularly for the light that contribution throws on the deep structure of Critical Legal Studies.

**\*\*Numbers in the format pg971 etc. refer to the pagination of the original article.**

FN1 Of course, a similar criticism can also be made of those who engage in an economic analysis of the law. Some writers making an economic analysis have also furnished us with important jurisprudential insights, such as the categorization of entitlements in Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972).

FN2 Unger, *The Critical Legal Studies Movement*, 96 Harv. L. Rev. 561, 563-76 (1983).

FN3 At first, my students resolved their dilemma by concluding that I was out of step with the rest of the faculty and a proper object of resistance. With the passage of time, I've become a better salesman for my approach so that students aren't quite as thrown by it; but I still confess to having some trouble getting the message across.

FN4 See R. Dworkin, *Taking Rights Seriously* 14-45 (1977).

FN5 Id. at 81-130.

FN6 In Unger's words: [CLS attempts] to cross the boundaries that separate doctrine from empirical social theory and from argument over the proper organization of society.... [CLS] method is to show, as a matter of truth about history and society, that [abstract ideals, such as freedom of contract or political equality] can receive—and almost invariably have received—alternative institutional embodiments, each of which gives a different cast to their guiding intentions. Unger, *supra* note 2, at 577-78.

FN7 Unger argues that the class of legitimate doctrinal activities must be enlarged. [O]nly such an expansion could generate a conceptual practice that maintains the minimal characteristics of doctrine—the willingness to take the extant authoritative materials as starting points and the claim to normative authority—while avoiding the arbitrary juxtaposition of easy analogy and truncated theorizing that characterizes the most ambitious and coherent examples of legal analysis today. Unger, *supra* note 2, at 577.

FN8 Unger, *supra* note 2, at 563-76.

FN9 For an analysis, see A. D'Amato, *Jurisprudence: A Descriptive and Normative Analysis of the Law* 132-39 (1984).

FN10 Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685 (1976).

FN11 Unger, *supra* note 2, at 618-25.

FN12 Kennedy, *Distributive and Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 Md. L. Rev. 563 (1982).

FN13 H. A. Murray, *Explorations in Personality* (1938).

FN14 Unger, *supra* note 2, at 629.

FN15 Kennedy, *supra* note 10, at 1685. While Kennedy initially identifies altruism and individualism as modes of rhetoric, he also locates these polarities at a “deeper level.” “[W]e are divided, among ourselves and also within ourselves, between irreconcilable visions of humanity and society....” *Id.* Professor Kennedy's writing suggests, however, that people have the power to isolate and choose one or the other of the contradictory tendencies. But if he is talking about what people have the power to do, as opposed to what they actually do, his doctrine is no longer descriptive or jurisprudential, but rather becomes prescriptive and legislative.

FN16 A. D'Amato, *supra* note 9, at 295 n.30.

FN17 A. D'Amato, *supra* note 9, at 155-79.

FN18 *Id.* at 56-92.

FN19 Bribes are harder to deal with than bias. I've suggested that rotation and anonymity of judges is an important structural element in reducing the possibility of bribery. See A. D'Amato, *supra* note 9, at 34-45.

FN20 Fletcher, *Paradoxes in Legal Thought*, 85 *Colum. L. Rev.* 1263, 1272-79 (1985).

FN21 See D'Amato & Eberle, *Three Models of Legal Ethics*, 27 *St. Louis U.L.J.* 761, 777-78 (1983).

FN22 D'Amato, *Legal Uncertainty*, 71 *Calif. L. Rev.* (1983).